Supreme Court, U.S.
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No.

**IN THE
SUPREME COURT OF THE
UNITED STATES**

October Term, 1997

David Trippett,
Petitioner,

-vs-

James E. Fagan,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petition for Writ of Certiorari

Submitted by:
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65 pp

Question presented

Whether the Federal District Court properly granted respondent's 28 USCS sec. 2254 petition for habeas corpus relief on grounds of ineffective assistance of counsel for the failure to obtain an expert witness to discredit DNA evidence identifying respondent as the father of a fetus which was aborted by his daughter in a case charging respondent with rape, [criminal sexual conduct, first degree] where the respondent failed to establish the prejudice prong of **Strickland v Washington**, where his belatedly obtained DNA expert testified that the DNA trial evidence determining his paternity was unreliable because of the failure to test and rule out the rape victim's twelve year old brother as the possible father, where there was evidence that said brother slept in the victim's bedroom and thus had "access" to her, but where the term "access" in cases involving questions of rape and paternity contemplate that there be evidence of sexual intercourse, whereas, in the case **sub judice** there is no evidence of sexual intercourse between the rape victim and said twelve year old brother, thus rendering the testimony of respondent's DNA expert to be without legal significance since it could not serve to impugn DNA evidence identifying him as the father in this case.

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Now comes the Petitioner, David Trippett, Warden, in the State of Michigan, by Arthur A. Busch, Prosecuting Attorney in and for the County of Genesee, Michigan, and Donald A. Kuebler, Chief, Research, Training and Appeals, and prays that a writ of certiorari will issue to review the judgment of the United States Court of Appeals, Sixth Circuit, filed on July 1, 1997 affirming the opinion and order of the United States District Court, Gilmore, J., granting respondent's petition for habeas corpus entered May 30, 1996, which reversed his conviction for the crime of criminal sexual conduct on grounds that defendant was not effectively represented by defense counsel for the failure to engage an expert witness to rebut DNA evidence implicating defendant as the perpetrator of said crime following DNA testing of respondent, his daughter and her aborted fetus.

A United States Supreme Court decision is necessary in this case not only to order reinstatement of respondent's rape conviction, but to advance the jurisprudence with respect counsel's duty to investigate in criminal cases.

DNA trial evidence was in the early stages of the science when this case was tried in Michigan in 1988.

In the case **sub judice**, contrary to the decision of the District Court, (App 25a) petitioner submits that it was not reasonably likely that a reasonable attorney, operating under the circumstances of the case and acting in a reasonable professional manner, would have located such a witness. See e.g., **Elledge v Dugger**, 823 F2d 1439 (CA11 Cir 1987); **State v Ashley**, 940 SW2d 927 (Mo App 1997); and **Horsley v Alabama**, 45 F3d 1486 (CA11 1995).

[Citations to opinions below]

The unpublished decision of the United States District Court, Gilmore, J., in **Fagan v Trippett**, USDC ES No. 95 CV 71040 DT was entered May 30, 1996. The United States Court of Appeals affirmed in a Memorandum opinion entered July 1, 1997 in **Fagen v Trippett**, No. 96-1870. Copies of the opinions are included in the appendix to this petition. [App 17a-27a]

[Jurisdiction]

The decision of the United States District Court was filed May 30, 1996. The United States Court of Appeals affirmed on July 1, 1997. [App 16a-26a] Jurisdiction of this Honorable Court is invoked under authority of 28 U.S.C. sec. 1254(1).

[Constitutional provision involved]

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[Statement of facts]

Respondent, James E. Fagan, was jury-convicted in the Genesee County Circuit Court, Flint, Michigan, of rape, i.e., first degree criminal sexual conduct, contrary to MCL 750.520b(2)(c); MSA 28.788(2) (1)(c). The Michigan Court of Appeals affirmed in an unpublished per curiam opinion, but remanded for resentencing. **People v Fagan**, unpublished opinion fo the Court of Appeals, decided [Feb 24, 1994] (Docket No. 113830). [App 9a-14a] The Michigan Supreme Court denied leave to appeal in an order entered over the dissent of Justice Levin. **People v Fagan**, 447 Mich 1039, 527 NW2d 515 (1994). [App 16a]

The rape victim was Fagan's own 14 year old daughter, Tometrick Brown, who became pregnant in June of 1986 and had an abortion several months later.

Fagan was represented by attorney James J. Zimmer. At a preliminary examination on October 2, 1986, Tometrick Brown testified that on June 12, 1986, her father wakened her at about 5:00 in the morning and led her into the living room. He asked her if she was going to be upset if he asked her to do something. Then he fondled her, removed her clothing and penetrated her orally and vaginally. (R 11; preliminary examination transcript, pp 6-17) She testified that the same thing happened on four subsequent occasions. (Id., pp 21-43) She testified that Fagan was her father, although he and her mother never married, and that he had moved out of the house about six months before these incidents occurred. Her mother left the house every day for work at 4:45 a.m. and these incidents occurred after she was gone. (Id., pp 44) Fagan was bound over for trial on the charge.

The record shows that Fagan urged his attorney to secure a definitive blood test that would clear him. (R21; Hearing on Remand, p 16) As counsel attempted to comply with his client's request, trial dates were set and adjourned throughout 1987. On April 19, 1988, the fifth scheduled trial date, Mr. Zimmer and the prosecutor, Lenore Ferber, appeared before the court and the following ensued:

> THE COURT: Now it's my understanding that there have been some developments in the case, and I want counsel to place those on the record, and to know your respective positions.
>
> MR. ZIMMER: Just by way of background, we have gone into it. Sometime ago I brought a motion by way of a motion for discovery to have certain tests run on the fetus to determine whether my client was in fact the father of the fetus, et cetera.
>
> At the time the matter was argued in front of Judge Elliott. The Prosecutor argued there was no such test and I talked to some medical people and they informed me there was no such tests.
>
> Within the last couple of months there has been a test, the Prosecutor learned of it and I learned of it and we have now set the mechanism in motion to obtain that test, and I think Miss Ferber has the information relative to that test, your Honor.
>
> THE COURT: Miss Ferber?
>
> MISS FERBER: The fetus was sent to Lifecodes Corporation in Valle, New York. They received it

> April 14th, sent a receipt for it. Via a call today it was indicated late this afternoon they will know whether or not there is enough DNA in the fetus to run any further test.
>
> If there is enough DNA, they will need blood samples drawn from both parents involved, our respective parties, and once they get the blood it will be at least four weeks from the date they get the blood until their tests are concluded.
>
> Mr. Zimmer and I expect we can get the blood out to them by this week, Friday of this week.
>
> MR. ZIMMER: Yes, we will agree to have blood drawn as soon as we can arrange it and send it to the lab. And my clients' position is that he would wish this test to be done, and we believe it is in the interest of justice, and the time involved my client would request an adjournment for that length of time.
>
> (R 19; Transcript of April 19, 1988 pp 4-6 --transcript misdated as April 19, 1989)

The Court set a new trial date for June 21, 1988. On May 31, 1988 the prosecutor moved for another adjournment of the June date because the New York laboratory was stating that the results would not be ready for another six to eight weeks. The Court set a new trial date for August 2, 1988, commenting, "This looks to me like the oldest criminal case on my docket, so I forewarn you, Miss Ferber." (R 12; Transcript of May 31, 1988)

On August 2, 1988, the following record was made:

THE COURT: Miss Ferber, I'm interested in what you want to do with this case. It's a very old case, and I'm growing short of patience with it.

MISS FERBER: Your Honor, we called Lifecodes last week and then again yesterday. They said their report would be completed and typed and to us by the end of this week.

I know what the report contains at this point, and communicated that to Mr. Zimmer as soon as I found out; however, not having the report we did not subpoena this matter so it is not going today.

Mr. Zimmer indicated that he didn't feel he could do any cross-examination of our witnesses until he had the report and was able to talk with the people at the laboratory in New York. I would expect that if the matter does not go to trial, we could try this case by next week if that's suitable for Mr. Zimmer.

MR. ZIMMER: Your Honor, there are a few dates next week that are unavailable to me, the 10th, the 11th and maybe the afternoon of the 9th.

THE COURT: Well, first of all let's begin with what I assume is Miss Ferber's request to adjourn the trial.

MISS FERBER: That is correct for a short time.

THE COURT: What is your position on that, Mr. Zimmer?

MR. ZIMMER: Well, your Honor, I think we are prepared to go to trial; however, Mr. Fagan and I both agreed to have this test done. I would like to indicate for the record that I have called Lifecodes on several occasions over the last month. Each time they indicated they would call me back. They have never called me back. They have never sent me the material that I needed to study it to see what their test is all about. The only communication I have ever had with them is through the Prosecutor's Office. As far as the results of the test, I have been told what they are. We are prepared to go to trial. Since we did join in the request to have the test in the first place, I think we would like to have the results of those tests too, so a week's adjournment would be fine.

I have some very serious matters that are up next week that I cannot be here on the 10th and 11th for sure, Judge, and maybe the afternoon of the 9th.

THE COURT: Because both counsel requested the testing, I's going to grant one final continuance, but I want Miss Ferber to be aware that if this case is not ready for trial the next time it comes up, it is very likely to be dismissed.

I'm going to continue this until Thursday, September 1st. You should be ready to pick a jury on that day. You should also plan

> that the case is going to be tried.
> (R 13; Transcript of August 2, 1988, pp 3-5)

Mr. Zimmer had just been informed that the DNA test results showed a high probability that his client was indeed the father of his own aborted grandchild. The attorney later described the impact of this news as "devastating." (R21; p12)

A month later, on September 2, 1988, Fagan went to trial. The prosecutor intended to call Tometrick Brown as his first witness, but she did not appear. Fagan's counsel agreed to allow the prosecutor to call the witnesses from Lifecodes since they had traveled from New York. Alan Giusti of Lifecodes, supervisor of the paternity laboratory, testified that he had tested the blood of the complainant, of the Petitioner and of the fetal remains to determine whether Petitioner could have been the father of the fetus, and had determined that he could have. (R15; Trial Transcript Volume II, pp 127-144) Kevin McElfresh, Ph.D., laboratory supervisor and manager, testified that the tests showed that only one black male out of 13,860 was a possible father, which translated to a probability of paternity of 99.93 percent, when three genetic systems were considered. He testified that the laboratory had also tested a fourth system, and considering all four, the numbers were one out of 2,321,650 or 99.996 percent. (Id. pp 156-165)

The following day Tometrick Brown and her mother, who had been arrested on bench warrants and detained overnight, testified. The complainant recanted her previous testimony, now testifying that Fagan had not had intercourse with her, and that the father of her aborted fetus was a boy her own age. She stated that she had lied in her earlier testimony.

She admitted that she didn't want her father's imprisonment on her conscience. (R16; Trial Transcript volume III, pp 223-234) On redirect examination, she stated that the father of her aborted fetus was a boy named Bernard White who attended Central High School. (Id., p 268) Petitioner was convicted by the jury.

Just three weeks after the trial, on October 3, 1988, Mr. Zimmer moved for a new trial on grounds that the testimony of the DNA experts should not have been taken out of order, and that the prosecutor had failed to show that there was sufficient acceptance of the validity of DNA testing methods within the scientific community, **Frye v United States**, 54 US App DC 46; 293 F 1013 (1923); **People v Davis**, 343 Mich 348, 72 NW2d 269 (1955). The court denied the motion, noting that Fagan had requested the DNA testing and that no request for **Davis/Frye** hearing had been made. (R 17; Motion Transcript) On October 4, 1988 Fagan was sentenced to life imprisonment.

Represented by new appointed counsel, Fagan appealed. Counsel on appeal argued that the court should have held a **Davis/Frye** hearing, and that he was denied due process by the lack of sufficient safeguards insuring the reliability of the DNA test. Counsel also argued that Mr. Zimmer provided ineffective assistance of counsel because of his failure to challenge the DNA testimony. Sentencing issues were also raised. (R 25; **People v Fagan**, CA 113830). On September 13, 1989, the Michigan Court of Appeals granted Fagan's motion to remand for a hearing on effective assistance of counsel pursuant to **People v Ginther**, 390 Mich 436, 212 NW2d 922 (1973).

During the following 20 months, Fagan's appellate counsel investigated the

issue of the forensic use of DNA evidence, and engaged the services of an expert, Dr. Grunbaum, who worked on the case throughout 1990, including a trip from this his home in California to the New York laboratory of Lifecodes. (R 20; Hearing on Motion for Payment of Fees and Expenses, p 3)

The remand hearing was held on May 30, 1991. In an opening statement, Fagan's appellate counsel made the following comments:

> Now as you know, we -- I've been here on a couple of occasions, we've discussed this case at length, we've discussed the issues of expert witnesses. And I assure the Court that I have spent a great deal of time the last year and-a-half investigating this case to determine exactly where -- where the challenge would lie and how the defense could challenge this evidence.
>
> * * *
>
> Now let me also point out as I indicated to Mr. Ake in a telephone conversation and I believe he relayed this information to you, that we have narrowed the focus of our attack. I am not going to require Mr. Ake to conduct a full blown **Frye** hearing on the admissibility of this evidence. That would be his burden certainly to conduct that hearing if we were to push it that far.
>
> But my research and all the experts that I've talked to have indicated to me that because the evidence in this case did not involve a stain, a blood stain or

> a semen stain, it involved what is in for all practical purposes a paternity test, that the actual scientific procedures used by the Lifecodes Laboratories will not stand up to an attack -- I'm sorry -- would survive an attack by the defense; that is, Mr. Ake could probably prevail at a **Frye** hearing. On the issue of the scientific procedures used in the analysis of the DNA.
>
> (R 21; Motion Haring, pp 5-7)

Fagan's Counsel emphasized that he was no longer attacking the admissibility of DNA evidence per se, but was challenging the validity of the DNA evidence as presented at the trial.

James Zimmer testified that he had represented Fagan at his trial. He agreed that Fagan had requested the DNA testing. (Id. pp 10-11) He described the results as "devastating." (Id., p 12) Mr. Zimmer went on to testify:

> Q Okay. Did you have any understanding at the time regarding the admissibility of DNA evidence generally in the Courts of this State?
>
> A Well, I was familiar with the **Frye/Davis** test except that I -- at the time I was under the impression that since I had stipulated to the test that I couldn't object to its admissibility.
>
> Q Do you still feel that way?
>
> A No. After the conviction, I did some more research and I discovered that I was wrong.

Q In fact, after the trial prior to sentencing you came in on a motion for new trial and asked for a **Frye/Davis** hearing; is that correct?

A Right. I did.

Q And you say you did that because you decided that you were wrong in not objecting to it at the time of trial?

A That's exactly right.

Q Okay. Did you at any time research the case law either in the State or nationally to determine if DNA evidence had been admitted in any other criminal cases?

A I -- Well, this is after the conviction, after the jury verdict I did. And I don't believe -- I can't remember. There was something -- I don't believe there were any cases that I fond at that time. I found some articles --

Q Okay.

A -- but no cases.

Q Okay. The articles that you found did they recommend as a defense attorney in a case like this that you should take certain actions?

A Yes.

Q And what did those articles recommend?

A They recommended that I

challenge the admissibility based upon the procedure -- I'm trying to remember because I don't have this whole file, and I didn't have a chance to review it. But it was based on a procedure in doing the test and how it applied to the particular facts as they were in any particular case.

Q But at any rate, it recommended that you challenge the evidence?

A Yes.

Q Did you at any time consult with any experts with regard to this evidence, any other scientist? I don't mean the ones the Prosecutor brought in, I mean any on your own?

A No.

Q Okay.

A No.

Q Did you make any attempt then to -- to obtain any expert to consult with or --

A Not before the trial.

Q -- to potentially testify? Okay.

A I mean, I've discussed it with some medical people that I know personally since then but not before.

Q Did you at time again before or during trial challenge the

statistical conclusions that were testified to by Dr. McElfresh?

A No.

Q Okay. Did you --

A Again, that was -- I was under the impression that I had agreed to that.

Q Okay. Did you at any time do any research of cases to determine whether these sorts of statistics and I'm specifically referring to the probability of paternity which is a statistic I earlier referred to.

Did you do any research to determine if the probability of paternity statistic had been determined to be admissible in a criminal case in this State.

A Before the trial?

Q Yes.

A No.

Q Or during the trial?

A Not before or during, no.

Q Did you understand at the time that probability of paternity statistics were admissible in paternity cases?

A Yes.

Q Okay.

A By statute.

Q By statute. Did you at any time make any independent effort to determine if the statistics in this case were accurate?

A I remember doing some research about that, but I'm not -- and that was before the trial.

Q You didn't find anything that would be helpful?

A No.

Q Okay. The -- these items that we have discussed, specifically the failure to object to either the statistics or the DNA evidence itself or to demand a **Frye** hearing or to obtain an expert, okay, were any of these failure on your part a -- an aspect of your trial strategy in this case?

A Well, I would say no. I think that at that time I was laboring under the false impression that I had agreed to this by the stipulation to do the DNA test.

Q You now recognize that you made a mistake?

A Absolutely.

MR. BRETZ: Okay. I have no further question

(Id., p 57)

Dr. Julian Adams, a professor of biology at the University of Michigan, testified as an expert in population genetics. He stated that he did not agree with the conclusions of the Lifecodes witnesses who testified at Petitioner's trial. (Id. p 33) The reason that he disagreed with the probability of paternity as reported by Lifecodes was that the laboratory had failed to take into account the fact that a male relative of Petitioner could be implicated as the father of Tometrick Brown's fetus. (Id., pp 35-37) Dr. Adams based his opinion on the fact that the trial testimony had revealed that Tometrick Brown shared a bedroom with her 12 year old brother. (Id., p 37) He recalculated the figures to achieve a probability of paternity based on an untested male relative and arrived at a figure of 87%, which he characterized as inconclusive. (Id., pp 38-41) Dr. Adams further stated that the obvious course of action would be to test the male relatives to see if they could be excluded. (Id., pp 53) On cross-examination, the prosecutor asked Dr. Adams the following:

> Q So unless there were some indication that the Defendant's son had anything to do with this, would you say that Lifecodes statistics were valid?
>
> A Lifecodes statistics are valid in this specific situation if you can rule out relatives, yes.
>
> (Id., p 57)

On March 12, 1992, the trial court denied Fagan's motion for new trial. The court held that he had failed to carry the burden of proof that the Lifecodes statistics were faulty because there was

no indication at trial or on remand that the rape victim's twelve year old brother had any sexual relationship with her. The court further held the DNA evidence was admissible in a criminal case because the Court of Appeals had so held in **People v Taylor**, 185 Mich App 1, 460 NW2d 582 (1990). [Opinion of trial court, App. 1a-6a, Mar. 12, 1992.]

Fagan filed a brief on remand, arguing that the trial court's opinion was erroneous under **Strickland v Washington**, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984). Where appellate counsel had originally argued in the appeals court that the trial court had erred by failing to hold a **Davis-Frye** hearing and that trial counsel was ineffective for failing to demand such a hearing, following the remand, and in accord with his comments at the remand hearing, counsel framed the issue differently. He argued that Fagan had received ineffective assistance of trial counsel due to counsel's failure to challenge the validity of the DNA test result in his case, and, in addition, that DNA paternity evidence in a criminal case violated the Fagan's presumption of innocence. (R 25; Brief after Remand, May 20, 1992).

On February 24, 1994, the Michigan Court of Appeals affirmed Fagan's conviction. The court stated the issue as an alleged failure by the trial court to hold a **Davis-Frye** hearing. The court held that any error was harmless since the court had recognized in subsequent cases that DNA identification testing has gained acceptance in the scientific community. On the issue of ineffective assistance of counsel, the court held that since the court had held in other cases that DNA evidence and probability of paternity statistics were admissible, Fagan's claim was without merit.

The court remanded for resentencing before a different judge because Judge Ransom had based his sentence in part on Fagan's denial of guilt. His motion for rehearing was denied on April 25, 1994. (R 25; **People v Fagan**, CA 113830 (Feb. 24, 1994). [App 9a-14a] Fagan was resentenced by Yeotis, J., to a term of eight to fifteen years imprisonment. [Trans. Feb. 8, 1995 -- circuit court file.]

Fagan sought leave in the Michigan Supreme Court. Leave to appeal was denied in **People v Fagan**, 447 Mich 1039, 527 NW2d 515 (1994). [App 16a]

Fagan's petition for habeas corpus was granted in **Fagan v Trippett**, USDC ES No. 95 CV 71040 (May 30, 1996). [App. 17a-27a] The United States Court of Appeals affirmed in **Fagan v Trippett**, No. 96-1870. [App 28a]

[Reasons for granting the Writ]

The Constitution guarantees a fair trial through the Due Process Clauses, but defines the basic elements essentially through several provisions of the Sixth Amendment, including the Counsel Clause. **Strickland v Washington**, 466 US 668, 685, 104 S Ct 2052, 80 L Ed 2d 673 (1984).

The components of an ineffective assistance of counsel analysis is set forth in **Strickland**. The benchmark for judging such a claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 US @ 66, 104 S Ct @ 2064. It is said that the ultimate focus is on the fundamental fairness of the trial. Id. @ 699, 104 S Ct @ 2070-71.

An ineffective assistance of counsel analysis has two components: 1) was counsel's performance deficient; and 2) did the deficient performance prejudice the defendant. Id @ 687, 104 S Ct @ 2064.

To demonstrate deficiency in performance of an attorney, a defendant is required to show "that counsel's representation fell below an objective standard of reasonableness." Id @ 688, 104 S Ct @ 2064. This requires a showing that the attorney's errors were so serious that the defendant was denied the "counsel" guaranteed by the Sixth Amendment. Id @ 687, 104 S Ct @ 2064.

Judicial scrutiny of attorney performance is highly deferential. Id @ 689, 104 S Ct @ 3065. The court must make every effort to evaluate an attorney's conduct from the perspective of the time it occurred, not in hindsight, with all of its inherent distortions. Id. A court must indulge a strong presumption that

counsel's performance falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id.

Even if a professionally unreasonable error occurred, the error will not result in reversal if the error had no effect on the judgment of the case. Id @ 691, 104 S Ct @ 2066-67. To prove **prejudice**, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id @ 94, 104 S Ct @ 2068. A reasonable probability is one that under mines confidence in the outcome. Id "It is not enough for the defendant to show that the errors had some effect on the outcome of the proceeding." Id @ 693, 104 S Ct @ 2067.

The District Court, Gilmore, J., determined that defense counsel's admission at the remand hearing that he had failed to contest the admissibility of the DNA results because he believed that, since defendant had requested DNA testing that he could not object, established "cause" under **Strickland, supra.** Judge Gilmore further found that there was a reasonable probability that absent counsel's error, the jury would have had a reasonable doubt about defendant's guilt, since the only direct evidence against defendant at trial was the DNA test results, and the results were not reliable because of the failure to exclude the victim's twelve year old brother, Cedric Brown, as a potential father. The court ordered that defendant be released if not tried within 90 days. (R 31, op. & order) [App 17a-27a] On appeal to the Sixth Circuit, the Court affirmed. [App 28a]

[Petitioner's claim]

Petitioner maintains that respondent Fagan failed to show a "reasonable possibility that, but for his attorney's error, the verdict would have been different. Without a showing of reasonable possibility, respondent Fagan has failed to establish the requisite prejudice to sustain an ineffectiveness of counsel claim. **United States v Faubion**, 19 F3d 226, 230 (CA5 1996); **United States v Guerrero**, 938 F2d 725, 727 (CA7 1991).

[The Law]

In **Strickland** the Court sets forth the standards for assessing an ineffective assistance of counsel claim alleging a failure to investigate: "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 US @ 691, 104 S Ct @ 2066.

In the case **sub judice** the District Court, Gilmore, J., found that defense counsel's admission at the remand hearing that he had failed to challenge the admissibility of the DNA results because he believed that, since defendant had sought the expert testimony that he could not object, established "cause" under **Strickland**. The court further found that there was a reasonable probability that, absent trial counsel's error, the factfinder would have had a reasonable doubt about defendant's guilt, since the only direct evidence against him at trial was the DNA test results, and the results were not reliable because of the failure to exclude the CSC victim's twelve year old brother [Cedric Brown] as a potential father. [App 17a-27a; R 31, opinion and order]

Petitioner, contrary to the decision of the District Court below, maintains that defendant failed to establish the requisite prejudice to sustain an ineffectiveness of counsel claim. **United States v Guerrero**, 938 F2d 725, 727 (CA7 1991). Petitioner further submits that the United States Court of Appeals order affirming was improper.

In the case **sub judice**, the District Court based its decision to reverse on the belatedly obtained expert testimony of biologist Dr. Julian Adams. Dr. Adams testified that the paternity index calculation used by Lifecodes in this case was inaccurate because "any of petitioner's male relatives who had **access** to Tometrick Brown must have been tested and ruled out as possible fathers." The District Court then reasoned as follows:

> ...In this case, the trial testimony revealed that at the time she became pregnant, Tometrick Brown shared a bedroom with her twelve year old brother, Cedric Brown. Dr. Adams testified that unless Cedrick Brown was tested and ruled out as a possible father of Tometrick's fetus, the DNA tests conducted by Lifecodes were inconclusive. Cedric Brown was not tested, and not factored into the Lifecodes' test results. Hence Dr. Adams concluded that the DNA paternity test results submitted by Lifecodes were inconclusive and should not have been admitted against petitioner at trial. [App 25a]

The District Court found that if defense counsel had procured testimony from Dr. Adams or similar expert on DNA paternity testing, it is reasonably probable that defendant would have been acquitted. [App 25a] Judge Gilmore

further found that:

> . . . Because Cedric Brown shared a bedroom with his sister during the relevant time period, Lifecodes was required to rule him out as a possible father before the lab could use paternity index calculations to determine the likelihood of petitioner's guilt. Because they did not, the tests were inconclusive and should not have been admitted at trial. [26a]

The District Court determined that Fagan carried his burden of showing both "cause" and "prejudice" under **Strickland**, and concluded that he was denied effective assistance of counsel and his right to a fair trial and thereafter granted the petition for habeas corpus relief. [App 26a]

Petitioner maintains that the District Court's grounds for reversal are not legally acceptable.

The District Court's emphasis on "access" of the twelve year old brother of the rape victim because he slept in her bedroom is too superficial. Under the jurisprudence, courts are required to construe words that have acquired a peculiar and appropriate meaning in the law, according to such peculiar and appropriate meaning. See e.g., **McCann v Michigan**, 47 Mich App 326, 209 NW2d 456 (1973). Judge Gilmore failed to do so in this case.

In the case of **In re Paternity of M.J.B.**, 425 NW2d 404 (Wis 1988) the court answered the question of whether a jury must make a separate finding by clear, satisfactory and convincing evidence that sexual intercourse took place between the mother and putative father before the jury

may consider the blood test report. Answering in the affirmative, the court held that an independent finding of sexual intercourse was required before the jury could consider the statistical chance of paternity as evidence of paternity. See also **Department of Human Services v Moore**, 632 So2d 929, 935 (Miss 1994).

In **Jackson v Jackson**, 76 P2d 1062 (Okl 1938) the court said that in general, proof of **access** between husband and wife during the period when a child must have been begotten is conclusive as to its legitimacy. The court explains that:

> The word "access" as there used means sexual intercourse and not merely presence together of the husband and wife under circumstances which afford opportunity for such intercourse.

In the case **sub judice**, Dr. Adams rendered a scientific opinion without a proper factual basis for his conclusions. Both Dr. Adams and Judge Gilmore, appear to use the word "access" in the sense of opportunity for, rather than of actual intercourse. But as pointed out above, that is not how **access** is used in this area of the law. That is to say, that the twelve year old brother of the rape victim, was not shown to have "access" to her as defined by the jurisprudence. More specifically, it was never shown that the twelve year old brother had sexual intercourse with the victim. In the absence of evidence of sexual intercourse between the siblings, petitioner maintains that Dr. Adams and the District Court below, improperly concluded that Lifecodes' test results were inconclusive. Contrary to the contention of the District Court, petitioner submits that the mere sharing of a bedroom by siblings, in and of itself, does not require that Lifecodes rule out the twelve

year old brother as a possible father before it could use paternity index calculations to determine the likelihood of defendant's guilt.

The Michigan trial judge in this case, Ransom, J., was right on target when he denied Fagan's motion for new trial. He said in pertinent part:

> According to defendant's expert, the statistical analysis only becomes defective if one includes the victim's younger brother as a potential father. It is significant that no one in the case at bar ever suggested the victim's younger brother as having any sexual relationship with the victim. Neither the victim nor the defendant ever asserted such a claim nor was there any intimation by way of circumstantial evidence that would support such assertion. [R. op. of Mar. 12. 1992 @ 5; App 5a]

To prove ineffective assistance of counsel, Fagan must show that his attorney's performance was deficient and the deficient performance prejudiced his defense. **Alexander v Armontrout**, 985 F2d 976, 978 (CA8 1993), cert den___ US___, 114 S Ct 224, 126 L Ed 2d 180 (1993). The performance of Fagan's attorney was deficient if the attorney's representation was less than objectively reasonable. Id. The attorney's performance prejudiced Fagan's defense if there is a reasonable probability that Fagan would not have been found guilty of rape in the absence of the deficient performance. Id. A reasonable probability is a probability sufficient to undermine confidence in the trial's outcome.

Petitioner asserts that the performance of Fagan's attorney was not deficient because the attorney's failure

to obtain a witness such as Dr. Adams is without legal significance.

To show his attorney's deficient performance prejudiced him, Fagan need not show that he could not have been convicted. Instead, he need only undermine the court's confidence in the trial's outcome. **Alexander**, 985 F2d @ 978.

The case **sub judice** bears little resemblance to those where it was found that counsel's failure to investigate deprived the defendant of his sixth amendment right to counsel.

To prevail on his ineffective assistance of counsel claim, Fagan was required to show that counsel's performance was deficient and that he was prejudiced by that performance. **Strickland v Washington**, 466 US 668, 687, 104 S Ct 2052, 2064, 80 L Ed 2d 674 (1984). Counsel's performance was deficient if it fell "outside the wide range of professionally competent assistance." Id. Counsel's performance was prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. @ 694, 104 S Ct @ 2068.

Both components of an ineffective assistance of counsel claim are mixed questions of law and fact. **Strickland**, 466 US @ 698, 104 S Ct @ 2070. On appeal the district court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. See e.g., **Wilson v Armontrout** 963 F2d 817, 819 (CA8 1989); **Sanders v Ratelle**, 21 F3d 1446, 1451 (CA9 1994).

In this case, even if Fagan's attorney had been able to locate a witness such as Dr. Adams or an expert familiar with this

type of DNA paternity testing, their testimony or challenge to the findings of Lifecodes would not have been admissible at trial since there was no competent evidence that the twelve year old brother of the rape victim had "access" to her in the legal sense, i.e., sexual intercourse at the time pertinent herein. [See trial court's op., App 5a] Accordingly, the District Court's **vacatur** of defendant's conviction based on ineffective assistance of counsel is improper.

In **Strickland** we are reminded that "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." **Strickland** @ 686, 104 S Ct @ 2064. When presenting ineffectiveness claims, petitioners bear the burden of showing, first, that counsels' performance was constitutionally deficient and, second, that this deficient performance prejudiced their defense. Id.

Most important, a reviewing court must avoid second-guessing counsel's performance. Id. As is often said, "Nothing is so easy as to be wise after the event." The reviewing court should always presume strongly that counsel's performance was reasonable and adequate; and a petitioner alleging ineffectiveness bears the burden of overcoming this strong presumption. Id.

Even in the light of this permissive review of counsel's performance under **Strickland**, on rare occasions conduct may be found unreasonable. But unreasonable conduct will not warrant relief if the petitioner fails to prove affirmatively that the unreasonable conduct prejudiced his case. Id. @ 693, 104 S Ct @ 2067. To establish prejudice, a petitioner proves nothing if he alleges only that the unreasonable conduct might have had "some

conceivable effect on the outcome of the proceeding." Id. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. @ 694, 104 S Ct @ 2068.

Since questions of ineffectiveness are mixed questions of law and fact, the Court exercises plenary review. Id. @ 698, 104 S Ct @ 2070. And applying **Strickland**, the reviewing court is free to dispose of ineffectiveness claims on either of its two grounds. Id. @ 697, 104 S Ct @ 2069.

It is also said that the district court's findings of fact are reviewed under the clearly erroneous standard. **Battle v Delo**, 19 F3d 1547,1552 (CA8 1994) citing **Laws v Armontrout**, 863 F2d 1377, 1381 (CA8 1988) (en banc) cert den, 490 US 1040, 109 S Ct 1944, 104 L Ed 2d 415 (1989).

Judge Gilmore, relied on defense counsel's testimony professing ineffective representation for his failure to challenge the DNA evidence to meet the "cause " requirement of **Strickland**. [App 23a]

Petitioner respectfully submits defense counsel's testimony, professing ineffectiveness, should not have been given substantial weight because ineffectiveness is a question which the court on review must decide so "admissions of deficient performance by attorneys are not decisive." **Harris v Dugger**, 874 F2d 756, 761, n. 4 (CA11 1989).

It is undoubtedly true that effective assistance of counsel embraces adequate pretrial investigation. "[W]hen a lawyer fails to conduct a substantial investigation into any one of his client's plausible lines of defense, the lawyer has failed to render effective assistance of

counsel." **McCoy v Newsome**, 954 F2d 1252, 1262-63 (CA11 1992) Failure to investigate evidence that would be helpful to the defendant is also an indication of ineffective assistance of counsel. **Goodwin v Balkcom**, 684 F2d 794, 805 (CA11 1982), disapproved on other grounds by **Zant v Stephens**, 462 US 862, 103 S Ct 2733, 77 L Ed 2d 235 (1983).

The decisions teach however, that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set forth in **Strickland** and its progeny. Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." **Rogers v Zant**, 13 F3d 384, 386 (CA11 1994). It is said that that result is no accident but instead flows from deliberate policy decisions the Supreme Court has made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential," and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance." **Strickland**, 466 US @ 689-90, 104 S Ct 2065-66, cited in **Waters v Thomas**. 46 F3d 1506, 1511 (CA11 1995)

Petitioner maintains that under the facts of this case and the jurisprudence, it cannot be said that defense counsel's failure to obtain a DNA expert to challenge Lifecodes determination of Fagan's paternity constitutes ineffective representation. This case bears little resemblance to those where the courts have found that counsel's failure to investigate deprived defendant of his sixth amendment right to counsel. An intellectually honest appraisal of this case should compel this Court to conclude that nothing presented by Fagan would

shake the Court's confidence in the outcome. The evidence of defendant's belatedly produced expert, Dr. Adams, would not cast doubt on Lifecodes' determination of the probability of Fagan's paternity of his daughter's aborted fetus. The failure to investigate cannot be used as a substitute for proof of prejudice in an ineffective assistance of counsel claim. **Williams v Washington**, 59 F3d 673 (CA7 1995). This Court should reach the same conclusion and reverse the United States District Court and United States Court of Appeals below and reinstate Fagan's conviction and sentence.

[Conclusion]

Wherefore, petitioner respectfully requests that this Honorable Court will grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals, Sixth Circuit.

Dated: September 17, 1997

Respectfully submitted:

_____

Donald A. Kuebler P 16282
Chief, Research, Training & Appeals

Arthur A. Busch P 33872
Prosecuting Attorney
Genesee County, Michigan

[Petitioner's Appendix]

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STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

PEOPLE OF THE ST OF MICH Plaintiff,	Circuit Court No. 86-36977-FC
vs	
JAMES EDWARD FAGAN, Defendant.	Robert M Ransom Circuit Judge

Opinion

This matter is before the Court on:

(1) REMAND from the Michigan Court of Appeals to conduct an evidentiary hearing on the assertion that Defendant was denied effective assistance of counsel. **People v Ginter**, 390 Mich 463 (1973). **People v Johnson**, 413 Mich 487 (1982).

(2) Defendant's subsequent motion for new trial;

(3) Defendant's motion for bond pending appeal;

(4) Defendant and defender administrator's request for an order regarding payment of Lifecodes Corporation's bill for services.

CONCLUSIONS

(1) Defendant has failed to establish its claim for ineffective assistance of counsel.

(2) Defendant's motion for new trial is DENIED.

(3) Defendant's motion for bond pending appeal is DENIED.

(4) Defendant's motion for payment of

appropriate Lifecodes Corporation's expenses by Genesee County id GRANTED.

Lifecodes' bill for services in the amount of $1300 is allowed and shall be apportioned equally between the Prosecutor and the Defender Administrator.

Payment of Lifecodes' bill of $450 is DENIED as inappropriate.

FACTS

Defendant James Edward Fagan was convicted of Criminal Sexual Conduct in the First Degree Following a trial by jury. The victim was Defendant's fourteen year old daughter who became pregnant as a result of the incident. The aborted fetus was preserved from which Defendant requested DNA tissue typing. The Prosecutor subsequently joined in this request. There were numerous joint requests by prosecutor and defendant to postpone the trial of this cause so to permit the evolution of and subsequent tissue typing through the genetic fingerprinting shown as DNA typing. DNA typing was done by Lifecodes, Inc of New York. Dr. Kevin McElfresh of Lifecodes testified that the test results established a 99.996% probability that Defendant impregnated his daughter.

At trial, the victim recanted her earlier testimony identifying her father, the Defendant, as the one who sexually assaulted her and identified a previously unknown schoolmate, Bernard White, as being responsible for her pregnancy. A search of the records of all students enrolled in the Flint Public Schools failed to reveal a Bernard White..

Defendant denied having sexual relations with his daughter.

Defendant's appellate counsel

initially asserted that he was denied effective assistance of counsel when his trial counsel:

> (a) Failed to challenge the scientific reliability of DNA testing via a **Frye-Davis** hearing; and
>
> (b) Failed to seek experts to evaluate whether DNA testing was performed properly in this case.

The Michigan Court of Appeals remanded to the trial court "for the purpose of conducting an evidentiary hearing on the assertion that the Defendant was denied effective assistance of counsel:"

At Defendant's request, this Court granted Defendant's motion for discovery in the hiring of an expert to assist in evaluating the DAN typing that had been done. The discovery order included an order that Defendant's counsel and his expert witness be allowed to visit the Lifecodes laboratory in New York to inspect and review the DNA typing process.

After completion of discovery, Defendant's appellate counsel concluded:

> (a) The scientific reliability of DNA typing of fetal tissue is established; and
>
> (b) Generally accepted procedures were utilized in this DNA typing.

Defendant now asserts that the statistical analysis of the probability that Defendant was the father of his victim/daughter's child was faulty. Upon hearing, Defendant's expert, Dr. Julian Adams, testified that in his opinion there was an error in the computation of the probability of paternity index. According to Dr. Adams, if the victim's younger brother had been considered as a possible father, along with Defendant, the

Defendant's probability of paternity dropped to 86% which becomes inconclusive. Dr. Adams testified that if the victim's younger brother is excluded, the probability of paternity as identified by Lifecodes at 99.996% was accurate.

Defendant asserts that because Defendant's trial counsel did not challenge the statistical analysis as aforesaid, Defendant was denied effective assistance of counsel.

Pertinent to the allowance of expenses for Lifecodes Corporation is the fact that original autorads prepared by them for the DNA testing could not be produced subsequent to trial. This resulted in considerable delay and the necessity to repeat the DAN typing which, incidentally, reduced the same findings. The original autorads were thereafter located as they had been misfiled by a former employee.

DISCUSSION

ISSUE 1 and 2

The issues raised by Defendant for examination by the trial court are:

> (a) Was Defendant denied effective assistance of counsel by the failure of trial counsel to challenge admissibility of the statistical probability of Defendant's paternity as determined by DNA testing; and
>
> (b) Is evidence of the probability of paternity admissible in a criminal case charging Criminal Sexual Conduct.

The standard for determining whether or not Defendant received effective assistance from his trial counsel is enunciated in **People v Tommolino**, 187 Mich App 14, p 17 (1991) where the court states:

> "To establish a claim of ineffective assistance of counsel, the Defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Moreover, the Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Second, the deficiency must be prejudicial to the Defendant."

According to Defendant's expert, the statistical analysis only becomes defective if one includes the victim's younger brother as a potential father. It is significant that no one in the case at bar ever suggested the victim's younger brother as having any sexual relationship with the victim. Neither the victim nor the Defendant ever asserted such a claim nor was there any intimation by way of circumstantial evidence that would support such assertion.

Defense counsel cross examined personnel from Lifecodes Corporation with regard to test methods, the probability of paternity, and the storage and transportation of fetus and blood samples.

(T pp 125-126, 148-155, 171-180)

The Defendant has failed to carry the burden of showing that his trial counsel's performance was deficient for failure to question on a statistical probability based on a theory that had no factual basis in the evidence. It is particularly significant to note that no evidence was proffered in the remand hearing to support the statistical hypothesis advanced by Defendant's expert.

Defendant fails, on these facts, to

establish a claim of ineffective assistance of counsel.

The issue of whether evidence of probability of paternity is admissible in a criminal case was addressed by the Michigan court of Appeals in **People v Taylor**, 185 Mich App 1 (1990). In **Taylor** the results of human leukocyte antigens (HLA) typing blood tests were held admissible in a criminal action where the results are relevant to show a connection between the Defendant and the criminal act. HLA is widely accepted in the scientific community as reliable. This rational is controlling in the case at bar Defendant concedes, after extensive post conviction discovery that DAN testing was scientifically reliable and the testing procedures used were properly carried out.

ISSUE 3

The standards for admission to bail pending appeal are found in MCLA 770.9a(2) which provides:

> "A defendant convicted of an assaultive crime and sentenced to a term of imprisonment who has filed an appeal or an application for leave to appeal shall be detained and shall not be admitted to bail, unless the trial court or the court to which the appeal is taken finds by clear and convincing evidence that both of the following exist.
>
> (a) The defendant is not likely to pose a danger to other persons.
>
> (b) The appeal or application raises a substantial question of law or fact."

Defendant was convicted of Criminal Sexual Conduct in the First Degree and sentenced to a term of life imprisonment. The offense involved Defendant sexually assaulting and impregnating his fourteen year old daughter.

Defendant has failed to establish by clear and convincing evidence that he is not likely to pose a danger to others.

Further, this court does not find that Defendant's appeal raises a substantial question of law or fact for the reasons previously discussed in this opinion.

ISSUE 4

Defendant is indigent and has court-appointed counsel. As such, Defendant is entitled to have the assistance of an expert in evaluating complex scientific procedures of DNA testing. Genesee County is obligated to assume the appropriate cost thereof.

Lifecodes Corporation has submitted a bill for services in the amount of $1300 which covers the cost of autorads preparation and case materials. This expense was authorized by the Court.

Since DNA testing was requested by both the prosecution and the defense and, since both parties repeatedly joined in requests to postpone this trial so to allow for the evolution and subsequent DNA testing, the Court concludes that the $1300 expense should be shared equally between prosecutor and public defender budgets.

Lifecodes Corporation has submitted an additional bill for $450. Defense counsel advises that they were never informed there would be this $450 charge which appears to have been for consultation by Dr. McElfresh with defense counsel and

Defendant's expert, Dr. Grunbaum on January 14, 1991. In part, this visit was necessitated by Lifecodes misfiling of autorads and inability to furnish complete and accurate records. The charge of $450 submitted by Lifecodes Corporation is not approved.

This Court had previously approved appropriate fees for payment of Dr. Benjamin W. Grunbaum, Defendant's expert.

Dated: March 12, 1992

Robert M. Ransom
Circuit Judge

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE ST OF MICH.
Plaintiff-Appellee,

v

JAMES EDWARD FAGAN
Defendant-Appellant.

Feb. 24, 1994

No. 113830

LC No.
86-36977-FC

Before: Michael J. Kelly, P.J., and Hood and T.R. Thomas*,JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750b(1)(c); MSA 28.788(2)(1)(c), He was sentenced to life imprisonment. Defendant appealed, and requested a remand for a Ginther hearing. This Court granted defendant's request, and a hearing was held on May 30, 1991. The circuit court concluded that defendant failed to establish that he had been denied effective assistance of counsel. Thereafter, defendant appealed as of right. We affirm, but remand for resentencing.

Defendant's conviction stems from his alleged sexual intercourse with his 14-year-old daughter. Apparently, the victim became pregnant as a result, and an abortion was performed. Subsequent testing revealed that, within a 99% degree of certainty, defendant was the father of the aborted child. However, at trial, the victim recanted, testifying that defendant never had sexual intercourse with her.

I

Defendant first argues that the trial court erred in failing to hold a

Davis-Frye hearing to establish the acceptance and reliability of the DNA testing evidence. The Davis-Frye rule requires that novel scientific evidence be shown to have gained general acceptance in the scientific community to which it belongs before it is admissible at trial. People v Young, 418 Mich 1, 17-18; 340 NW2d 805 (1983), after remand, 425 Mich 470 (1986); People v Vettese, 195 Mich App 235, 238; 489 NW2d 514 (1992), lv den 441 Mich 925 (1993). The party offering the evidence has the burden of demonstrating its acceptance in the scientific community. People v Adams, 195 Mich App 267, 269; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916 (1993). The Davis-Frye test is applied only to new scientific principles or techniques. A party need not show the general acceptance of any already established test. People v Marsh, 177 Mich App 161, 164, 167; 441 NW2d 33 (1989).

Defendant failed to object to the testimony of the expert or introduction of the DNA testing evidence at trial and, therefore, failed to preserve the issue for appeal. In any event DNA identification no longer requires a Davis-Frye foundation, as this Court has recently recognized that DNA identification testing has gained general acceptance in the scientific community as reliable. People v Vaughn, 200 Mich App 611, 619; NW2d (1993); People v Adams, 195 Mich App 267, 277; 489 NW2d 192 (1992), modified in part on other grounds 441 Mich 916 (1993). Thus, the failure to conduct a Davis-Frye inquiry, if error, was harmless. Plaintiff introduced sufficient evidence to meet the Adams requirement that generally accepted laboratory procedures were followed in the instant case. Adams, supra at 277.

II

Next, we reject defendant's argument

that the probability of paternity statistic was inadmissible at trial. In People v Taylor, 185 Mich App 1; 460 NW2d 582 (1990), lv den 438 Mich 852 (1991), this Court specifically held that the probability of paternity statistics that defendant argues were inadmissible in this case were, in fact admissible in Michigan. Additionally, in Adams, supra, this Court held that DNA evidence, and the corresponding statistical interpretive evidence, is admissible, as the DNA test itself is meaningless without the accompanying statistics. We conclude that the DNA evidence, including the probability of paternity statistics, was admissible at trial. Therefore, we reject defendant's claim of ineffective assistance of counsel in this regard. People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991), lv den 439 Mich 902 (1991).

III

Defendant next argues that the trial court erred in applying the second edition of the sentencing guidelines. We disagree. The second edition of the guidelines must be used in all sentencing proceedings that take place after October 1, 1988. People v Fisher, 442 Mich 560, 581; 503 NW2d 50 (1993); People v Potts, 436 Mich 295, 298; 461 NW2d 647 (1990); People v Williams After Remand, 198 Mich App 537, 542; 499 Nw2d 404 (1993). Defendant was sentenced on October 4, 1988. Therefore, the trial court properly applied the second edition of the sentencing guidelines. Furthermore, retroactive application of the new sentencing guidelines does not violate the ex-post facto guarantees. People v Fisher, supra; People v Potts, 436 Mich 295; 461 NW2d 647 (1990).

IV

Defendant next argues that his life

sentence was excessively severe in light of the guidelines' recommendation of 120 to 300 months' imprisonment. The court articulated the following reasons for its departure from the guidelines' recommended range:

> Mr. Fagan, this offense involves a despicable sexual act with your daughter, and as a consequence she became pregnant at 14-years-of-age.
>
> I notes that you have engaged in a total denial of the circumstances surrounding this event with your daughter, and that carried throughout not only in the trial, but also in the Intake Assessment and Referral Center Report, and that is significant to the Court with regard to the possibility of rehabilitation. That denial indicates to the Court that the prognosis for rehabilitation is poor and will continue to be poor so long as there is not an acceptance of the circumstances.
>
> The DNA testing established beyond any reasonable doubt in the mind of the jury as well as this Court that you were responsible for the conception of your daughter. I am satisfied that [the victim] will carry scars as a result of this incident for the rest of her life, and I intend that not only to attach these reasons, but the portions of the presentence investigation report to explain why the court is imposing the sentence that is being imposed.

A sentencing court may not consider a defendant's refusal to admit his guilt in

imposing sentence. People v Yennior, 399 Mich 892; 282 NW2d 920 (1977); People v Draper, 150 Mich App 481, 489; 389 NW2d 89 (1986), remanded 437 Mich 873 (1990), On remand 188 Mich App 77 (1991). A sentence based on failure to admit guilt requires remand for resentencing before a different judge. People v Hicks, 149 Mich App 737, 748; 386 NW2d 657 (1986), lv den 425 Mich 882 (1986). In this case, on the record as well as on the sentence guidelines departure form, the trial court indicated that it based its sentence, which was a departure from the guidelines' recommended range, in part, upon the fact that "defendant engaged in total denial." Because a sentencing court may not consider a defendant's refusal to admit his guilt in imposing sentence, defendant's denial of guilt was improperly considered by the trial court in this case. Therefore, we remand this matter for resentencing before a different judge. People v Hicks, supra, at 748. In imposing the sentence in this matter the trial court shall follow the principle of proportionality set forth in People v Milbourn, 435 Mich 630, 461 NW2d 1 (1990). Furthermore, defendant is entitled to have any challenge to his presentence report resolved by the sentencing court prior to sentencing. People v Daniels, 192 Mich App 658, 675; 482 NW2d 176 (1992), lv den 440 Mich 880 (1992); People v Thompson, 189 Mich App 85, 88; 472 NW2d 11 (1991), lv den 439 Mich 999 (1992); People v Regelin, 178 Mich App 128, 130: 443 Nw2d 436 (1989), vacated in part on other grounds 437 Mich 897 (1991).

Defendant's conviction is affirmed. However, this matter is remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/Michael J. Kelly
/s/Harold Hood
/s/Terrence R. Thomas

People v Ginther, 390 Mich 436; 212 NW2d 922 (1973).

The Davis-Frye rule was adopted from People v Davis, 343 Mich 348; 72 NW2d 269 (1955) and Frye v United States, 545 US App DC 46; 293 F1013 (1923).

*Circuit judge, sitting on the Court of Appeals by assignment

Court of Appeals, State of Michigan

ORDER

MICHAEL J. KELLY

People v James E. Fagan — Presiding Judge

HAROLD HOOD

Docket# 113830 — TERRANCE R. THOMAS

L.C.# 86 036977 FC

_____ Judges

The motion for rehearing is DENIED.

A true copy entered and certified by Ella Wiliams, Chief Clerk, on

4-25-94

Ella Williams
Chief Clerk

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: December 20, 1994

99550

PEOPLE OF THE ST OF MICH
Plaintiff-Appellee,

v

SC: 99550
COA: 113830
LC: 86-36977-FC

JAMES FAGAN,
Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered and, it is DENIED, because we are not persuaded the questions presented should be reviewed by the Court.

Levin, J., would remand to the Court of Appeals as on rehearing granted to consider issues not addressed previously by the Court of Appeals.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 20, 1994

Corbin R. Davis
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES EDWARD FAGAN,
PETITIONER,

Civil No.
95-71040

v

DAVID TRIPPETT, Warden
Thumb Corr. Facility

Judge: Gilmore

ORDER GRANTING PETITION FOR HABEAS CORPUS PURSUANT TO 28 U.S.C. sec. 2254

Before the court is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. sec. 2254 by petitioner, James Edward Fagan. For the reasons discussed below, this Court GRANTS the petition and ORDERS that petitioner be released from custody.

I. Background Information

On September 8, 1988, petitioner was convicted of first degree criminal sexual conduct in violation of MCL 750.520b in the Genesee County Circuit Court, the Honorable Robert M. Ransom presiding. The complainant was his 14 year old daughter, Tometrick Brown, who became pregnant in June of 1986 and had an abortion several months later. At a preliminary examination, Ms. Brown testified that on June 12, 1986, petitioner wakened her around 5:00 a.m., shortly after her mother left the house for work. She stated that he fondled her, removed her clothing, and penetrated her orally and vaginally. She also testified that petitioner was her father, and that he had moved out of the house about six months before the incident occurred.

Trial in the matter was delayed

because petitioner sought to have DNA typing tests conducted to prove that he was not the father of his daughter's aborted fetus. Because DNA testing was not well established at that time, it took some time for petitioner to locate a facility that could perform the necessary tests. In early 1988, the parties learned of a laboratory in New York called Lifecodes, which could perform DNA paternity testing.

A jury trial commenced in September, 1988. The prosecutor intended to call complainant, Tometrick Brown, as his first witness, but she failed to appear in court. Because the supervisor of the laboratory conducting the DNA tests was present, and had traveled from New York, petitioner's counsel agreed to allow the prosecutor to call him as the government's first witness.

Alan Giusti of Lifecodes, supervisor of the paternity laboratory, testified that he had tested the blood of the complainant, the petitioner, and of the fetal remains and determined that petitioner could have been the father of the fetus. Kevin McElfresh, Ph.D., laboratory supervisor and manager, testified that the DNA paternity tests showed that only one black male out of 13,860 was a possible father, which translated to a probability of 99.93 percent, when three genetic systems were considered. He also testified that the laboratory tested a fourth genetic system, and when all four systems were considered, the number were one of 2,321,650 or 99.96 percent.

Overnight, complainant Tometrick Brown and her mother were arrested on Bench warrants and detained. On September 8, 1988, complainant testified in court. At that time, she recanted her previous testimony and stated that petitioner never

had intercourse with her, and that the father of her aborted fetus was a boy her own age. She stated that she had lied in her earlier testimony, and that she was coming forward now because she realized how serious the situation was. Despite complainant's recantation, petitioner was convicted.

On October 3, 1988, petitioner moved for a new trial on the grounds that the testimony of the DNA experts should not have been taken out of order, and that a "Davis/Frye hearing" should have been conducted to show that the DNA testing methods used were accepted within the scientific community. See **Frye v United States**, 54 US App DC 46, 293 F 1013 (1993)' **People v Davis**, 343 Mich 348 (1955). The court denied the motion, noting that petitioner had requested the DNA testing and had not asked for a Davis/Frye hearing.

On October 4, 1988, Judge Ransom sentenced petitioner to life imprisonment.

Petitioner appealed his conviction, raising seven issues, one of which was the claim of ineffective assistance of counsel presently before this court. The Court of appeals remanded the ineffective assistance of counsel claim to the trial court for a hearing, which was conducted on May 30, 1991. At that hearing, petitioner's trial counsel James Zimmer testified that petitioner had requested DNA testing prior to trial. Mr. Zimmer explained that because he had stipulated to the testing, he believed that he was precluded from challenging the use of the test results at trial. Mr. Zimmer further stated that he believed he made a mistake in not challenging the DNA evidence and that his failure to do so was not related to trial strategy.

Also at the May 30, 1991 hearing, the

trial court heard testimony from Dr. Julian Adams, Ph.D, a Professor of Biology at the University of Michigan, and a recognized expert in the field of population genetics. Dr. Adams testified that the DNA paternity statistics reported by Lifecodes were inconclusive and should have been challenged by petitioner at trial. He explained that the tests conducted by Lifecodes are only reliable if petitioner did not have relatives who could also have been implicated as the father. Because the trial testimony revealed that the complainant's 12 year old brother shared a bedroom with her during the relevant time period, Dr. Adams concluded that the DNA paternity test results were not reliable because the brother had not been tested and excluded as a possible father. Dr. Adams then recalculated the figures provided by Lifecodes, taking into account the existence of an untested male relative. He arrived at a figure of 87 percent, which he characterized as inconclusive.

On March 12, 1992, the trial court issued an opinion denying petitioner's motion for new trial, holding that petitioner failed to show that the Lifecodes statistics were faulty because there was no indication at trial or on remand that complainant's brother was the father. The court also held that DNA evidence is admissible in criminal cases, citing **People v Taylor**, 185 Mich App 1 (1990).

Petitioner than filed a supplemental brief in the Court of Appeals arguing that he was denied effective assistance of counsel because his trial counsel failed to investigate and challenge DNA evidence and failed to object to testimony regarding petitioner's probability of paternity on the grounds that such evidence violates the presumption of innocence.

On February 24, 1994, the Court of Appeals issued its opinion, finding that any error stemming from the failure to hold a Davis/Frye hearing was harmless because DNA testing had gained general acceptance. The court also held that the probability of paternity statistics were admissible, and dismissed petitioner's ineffective assistance of counsel claims. However, the court remanded the case for resentencing before a different judge because Judge Ransom had based his sentence in part on petitioner's denial of guilt.

Petitioner then filed an application for leave to appeal to the Michigan Supreme Court raising three issues, two of which were ineffective assistance of counsel claims based upon the testimony developed at the remand hearing. On December 20, 1994, the application was denied over Justice Levin's dissent.

On February 8, 1995, petitioner was resentenced to a term of 8 to 15 years. He is currently being held by the Michigan Department of Corrections at the Thumb Correctional Facility by respondent, Warden David Trippett.

II. Petition For Habeas Corpus Under 28 U.S.C. sec. 2254

After exhausting his state remedies, petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. sec. 2254. The petition sets forth the following claims of error: (1) that petitioner was denied effective assistance of counsel when his trial counsel failed to investigate and challenge evidence of DNA typing used against him at trial; and (2) that petitioner was denied effective assistance of counsel when trial counsel failed to object to testimony about petitioner's probability of paternity on the grounds that the evidence violated the presumption of innocence.

III. Ineffective Assistance of Counsel

The Sixth Amendment right to effective assistance of counsel protects the fundamental right to a fair trial. **Strickland v Washington**, 466 US 668 (1984). **Strickland** established a two-part test for ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

I.d. at 687. Thus, in order to prevail on this petition for writ of habeas corpus, petitioner must show "cause" and "prejudice" under **Strickland**.

Looking to the "cause" prong of the test, the court concludes that petitioner has shown that his trial counsel made errors so egregious that petitioner was denied effective assistance of counsel in violation of the Sixth Amendment. At the May 30, 1991 hearing on petitioner's ineffective assistance of counsel claim before the state trial court, petitioner's trial counsel James Zimmer testified. He states that he made material errors in handling the DNA typing evidence used

against petitioner at trial. Specifically, he testified that he mistakenly believed that because petitioner had agreed to DNA testing, he could not object to its use at trial. He explained that after the trial was over, he did some additional research and discovered that petitioner's stipulation to the testing did not prevent him from contesting the admissibility of the results at trial. Mr. Zimmer also testified that he never conducted research or consulted DNA experts to determine whether probability of paternity statistics should be admissible in criminal cases, even though such statistics had never been used in Michigan criminal cases before.

Based on this testimomy, the court concludes that petitioner has carried his burden of showing "cause" under **Strickland**. However, petitioner cannot prevail on his sec. 2254 petition unless he can show, under **Strickland**, that he was prejudiced by counsel's ineffectiveness. He has made such a showing.

Strickland places the burden on petitioner to "affirmatively prove prejudice" and to show that counsel's deficient performance "actually had an adverse effect on the defense." **Id.** at 693. The court must now consider whether there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," **Strickland**, 466 US at 694.

The record in this case, viewed in light of applicable law on the prejudice prong of **Strickland**, shows "a reasonable probability that, absent [counsel's] errors, the fact finder would have had a reasonable doubt respecting guilt." **Id.** at 695. The only direct evidence against petitioner at his trial was the DNA probability of paternity statistics

testified to by representatives from Lifecodes labs. Although petitioner's daugher, Tometrick Brown, had made previous statements to authorities that petitioner was the father of her aborted fetus, she recanted these statements at trial, and testified that her pregnancy was the result of sexual intercourse with a boy her own age. Hence, this court concludes that the DNA test results played a material role in petitioner's conviction.

Petitioner has raised two ineffective assistance of counsel arguments in his petition. First he argues that was prejudiced by his attorney's failure to conduct a proper investigation and challenge the evidence of DNA typing used against him at trial. Second, he asserts that counsel prejudiced him by failing to object to the DNA testimony on the grounds that probability of paternity statistics violate the presumption of innocence.

Looking to petitioner's first argument, the court concludes that petitioner was materially prejudiced by counsel's failure to research the DNA paternity tests being used in the case and to challenge the test results. At the May 30, 1991 hearing before the trial court on petitioner's ineffective assistance of counsel claim, a recognized expert in population genetics, Dr. Julian Adams testified on petitioner's behalf. After being recognized by the court as an expert in the field of population genetics, Dr. Adams stated that he was familiar with the trial transcript in the case. He discussed the DNA paternity tests performed by the Lifecodes lab, and explained in detail how these tests calculate probability of paternity. Specifically, he explained that the probability tests are based on an assumption that the individual being tested has a 50% chance of paternity. He

explained that this 50% assumption of paternity is generally accepted in the field of paternity probability testing.

However, he explained that a paternity index calculation using this 50% paternity assumption is based on a second assumption -- that no relatives of the individual being tested could possibly have been responsible for the pregnancy. Hence, in order for this type of testing to be accurate, any of petitioner's male relatives who had access to Tometrick Brown must have been tested and ruled out as possible fathers. In this case, the trial testimony revealed that at the time she became pregnant, Tometrick Brown shared a bedroom with her twelve year old brother, Cedrick Brown. Dr. Adams testified that unless Cedrick Brown was tested and ruled out as a possible father of Tometrick's fetus, the DNA tests conducted by Lifecodes were inconclusive. Cedrick Brown was not tested, and was not factored into the Lifecodes' test results. Hence, Dr. Adams concluded that the DNA paternity test results submitted by Lifecodes were inconclusive and should not have been admitted against petitioner at trial.

Respondent has failed to rebut this testimony, and has argued only that petitioner cannot show that he could have procured Dr. Adams to testify at this trial. Based on this record, this court concludes that if petitioner's trial counsel had procured testimony from Dr. Adams, or from another population genetics expert familiar with type of DNA paternity testing, it is reasonably probable that petitioner would have been acquitted on the sexual misconduct charges. Although it is true that Michigan courts have held that DNA evidence is generally admissible in criminal cases, **People v Taylor**, 185 Mich App 1 (1990), the courts have certainly never held that inconclusive

test results may be misrepresented and used against a criminal defendant at trial.

Dr. Adams' expert opinion is strong evidence that inconclusive rest results were misrepresented by Lifecodes and used against petitioner at trial. Dr. Adams never suggested that probability of paternity statistics are generally unreliable, he simply explained that the tests are based on certain assumptions which render the results meaningless unless all male relatives with access to the victim are ruled out as possible fathers. Because Cedrick Brown shared a bedroom with his sister during the relevant time period, Lifecodes was required to rule him out as a possible father before the lab could use paternity index calculations to determine the likelihood of petitioner's guilt. Because they did not, the tests were inconclusive and should not have been admitted at trial.

For these reasons, we conclude that petitioner has carried his burden of showing both "cause" and "prejudice" under **Strickland**. Accordingly, petitioner was denied effective assistance of counsel and was therefore denied his Sixth Amendment right to a fair trial. For these reasons, this petition for writ of habeas corpus, filed pursuant to 28 U.S.C. sec. 2254, must be granted.

As for the second argument raised in this petition, that probability of paternity statistics, even when properly calculated, are inadmissible because they violate the presumption of innocence, this court would be hesitant to make a direct comparison between assumptions used in well established scientific tests and the legal presumption of innocence. However, because the court has decided petitioner's ineffective assistance of counsel claim on

other grounds, the court need not, and will not, resolve this complex issue at this time.

For the reasons set forth above, IT IS ORDERED that petitioner's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. sec. 2254 be, and hereby is, GRANTED, on the grounds that petitioner's Sixth Amendment right to a fair trial was violated because he received ineffective assistance from his trial counsel.

IT IS FURTHER ORDERED that the State of Michigan must either retry petitioner or release him from state custody if he is not retired within 90 days from the issuance of this opinion.

IT IS FURTHER ORDERED that petitioner's motion for oral argument be, and hereby is DENIED, based on the court's determination that the substantial record in the case make it unnecessary to hear additional testimony on the arguments raised in the petition.

May 30, 1996
Date

Horace W Gilmore
US District Judge

NOT RECOMMENDED FOR PUBLICATION

No. 96-1870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES EDWARD FAGAN,
Petitioner-Appellee,

v

MEMORANDUM
OPINION

DAVID TRIPPETT,
Respondent-Appellant.

BEFORE: BROWN, NORRIS and DAUGHTREY,
Circuit Judges

PER CURIAM: David Trippett, the warden of a Michigan correctional facility, appeals from the order of the district court granting a writ of habeas corpus to petitioner, James Edward Fagan.

Having carefully considered the record on appeal and the briefs of the parties, and having had the benefit of oral argument, we are not persuaded that the district court erred in granting the petition.

Because the reasoning which supports granting the writ has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the order of the district court is affirmed upon the reasoning employed by that court in its order dated May 30, 1996.